ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

TIMOTHY A. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 11A04-0409-CR-512
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Ernest E. Yelton, Judge
Cause No. 11C01-0401-FB-4

May 31, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE[1]

Timothy A. Johnson (Johnson) appeals his sentences of dealing in a schedule II controlled substance,[2] as a Class B felony, and neglect of a dependent,[3] as a Class D felony, after a jury trial.

We affirm and remand.

ISSUES

1. Whether pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004) the trial court improperly found aggravators or improperly imposed the maximum sentence.

2. Whether the maximum sentence for both convictions was inappropriate in light of the nature of the offense and Johnson's character.

FACTS

On January 5, 2004, the Clay City Police Department and Clay County Sheriff's Department were dispatched to 911 Main Street, in response to a 911 call made by a small child who, according to the testimony of Chief of Police Terry Skaggs (Skaggs), could only say "mommy" and "bye-bye." (Tr. 89). When Skaggs arrived at the address, he noticed that the house was completely dark and he detected the smell of what he believed to be ammonia emanating from the house. Skaggs banged on all the doors and windows of the house, but no one inside responded. Skaggs and an assisting officer gained entry by kicking the front door down. Once inside, Skaggs observed that the

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[1] Oral argument was heard on March 22, 2005, at Northwest High School in Indianapolis, Indiana. We thank counsel for their presentations.

[2] Ind. Code § 35-48-4-2(a)(1).

[3] Ind. Code § 35-46-1-4(a)(1).

house was cluttered with "a lot of junk," as well as a tote bag which contained knives and a gun. (Tr. 91). They announced their presence and a small child, approximately two-years-old appeared, followed by Johnson and Tracy Hines (Hines), his girlfriend. Skaggs ordered both Johnson and Hines to the floor.

Skaggs testified that the smell of ammonia was even stronger inside the house and irritated his eyes. Skaggs learned that Hines and Johnson were the child's parents. Skaggs noticed many items around the house that could be used to manufacture methamphetamine. Skaggs ordered Johnson and Hines to stay where they were. Skaggs obtained Johnson's identification and went to his car to do a check for outstanding warrants. When Skaggs returned from his car, Hines was standing where he had left her, but Johnson had gone down to the basement and refused to come out. Skaggs and State Trooper Troy Cobb (Cobb) went down to the basement and brought Johnson out. Hines called for someone to pick up the child and then gave Skaggs consent to search the house. Skaggs and Brian Pierce (Pierce), a Deputy Sheriff, searched the house wherein they found precursors to manufacture methamphetamine, several fans, and heavy plastic lining the basement walls. The State Police Meth Lab Team was called to assess the safety of the area and secure evidence.

Both Johnson and Hines were placed under arrest. When Johnson saw Hines being handcuffed, he told Pierce "It's all mine. It's not hers. She didn't have anything to do with it." (Tr. 115). When Johnson was being booked, a search of his person revealed a baggie containing coffee filters that had a white powdery residue, which was later tested and found to be methamphetamine.

Johnson was charged with dealing in methamphetamine, as a Class B felony, and neglect of a dependant, as a Class D felony. On June 28, 2004, the matter was tried before a jury. During the jury trial, Johnson refused to wear civilian clothes and appeared in jail garb. Johnson would not aid in his defense or answer any questions directed at him by the trial judge or anyone else. Whenever he was addressed during the proceedings, he would respond that the "only thing [he] c[ould] accept [was] to be discharged and released immediately." (Tr. 15). On June 29, 2004, the jury returned a verdict finding Johnson guilty of both charges. On July 13, 2004, the trial court sentenced Johnson to twenty (20) years for dealing in methamphetamine and three (3) years for neglect of a dependent; the sentences were to run concurrently.

DECISION

1. Blakely

Johnson first argues that the trial court erred when it imposed the maximum executed sentence for both counts by relying upon improper aggravators. The trial court found the following aggravating factors: 1) Johnson's criminal history, which according to the Pre-sentence Investigation Report, consists of misdemeanor convictions for check deception in 1993, domestic violence twice in 1996 and twice again in 1997; 2) that he was a danger to society due to his reluctance to recognize the significance of a conviction for a Class B felony and his "failure to acknowledge the authority" of the court and law enforcement (Tr. 216); and 3) the age of the victim, his two-year-old daughter.

During oral argument, counsel for the State conceded that the age of the victim was an improper aggravator. However, the State's position was that the remaining

aggravators were appropriate to be considered by the trial court and support the imposition of the maximum sentence.

Our supreme court has recently held that Indiana's sentencing scheme is made unconstitutional by Blakely v. Washington, 124 S.Ct. 2531 (2004), but not nullified. Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005). The Indiana sentencing scheme was found unconstitutional because "it mandates both a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term." Id. Our supreme court, "influenced by the fact that the overarching theme of Indiana's 1977 sentencing reform was a legislative decision to abandon indeterminate sentencing in favor of fixed and predictable penalties," chose to make Indiana's sentencing scheme constitutional by requiring that a jury and not a judge find aggravating factors. However, a defendant's criminal history and any aggravators admitted by the defendant, may be considered by a trial judge for enhancement of sentence without the factors being found by a jury. Blakely, 124 S.Ct. at 2537-8.

Regarding the second aggravator the trial court found, it is undisputed that Johnson chose not to participate in his trial. However, it was not found by a jury that Johnson "fail[ed] to acknowledge the authority" of the court and law enforcement, nor did Johnson make such an admission. Therefore, the trial court's consideration of this factor as aggravating violated Johnson's Sixth Amendment rights. Pursuant to Blakely and Smylie, Johnson's criminal history is a proper factor for consideration by the trial court, but it stands as the only valid aggravating factor for the purpose of enhancing Johnson's sentence herein.

2. Appropriateness of Sentence

Johnson's final argument is that his sentence was inappropriate. Johnson calls our attention to Indiana Constitution Art. VII, Section 4, and Rule 7[4] of the Indiana Rules of Appellate Practice seeking an independent review of his sentence. He argues that the nature of the offense herein did not justify the maximum sentence. Specifically, he argues that this was his first drug offense and that his prior criminal history was minimal, consisting of misdemeanor convictions only.

Generally, sentencing determinations are within the trial court's discretion. Bonds v. State, 729 N.E.2d 1002, 1004 (Ind. 2000). However, pursuant to Indiana Appellate Rule 7(B), upon consideration of a challenge to the sentence imposed by the trial court, we may revise that sentence if it "is inappropriate in light of the nature of the offense and the character of the offender." When considering the appropriateness of the sentence for the crime committed, we initially focus upon the presumptive sentence. Rodriguez v. State, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), trans. denied. The presumptive sentence is meant to be the starting point for the trial court's consideration of the sentence that is appropriate for the crime committed. Id. The presumptive sentence for a B felony is ten years. Ind. Code § 35-50-2-5. Ten more years may be added for aggravators and four years may be subtracted from the presumptive if mitigating factors are found. Id.

We agree that Johnson's criminal history does not support the imposition of the maximum sentence for the dealing in a schedule II controlled substance, as a Class B

[4] The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in the light of the nature of the offense and the character of the offender. Ind. App. Rule 7(B).

felony. Johnson's criminal history is more than minimal, having been convicted of domestic violence four times and check deception once. However, he has never been convicted of a felony and this was his first drug offense. Therefore, we reduce the term of imprisonment for the Class B felony of dealing in a schedule II controlled substance from twenty years to fifteen years and we reduce the term of imprisonment for the Class D felony, neglect of a dependent from three to two years.

CONCLUSION

We affirm both convictions and remand to the trial court for entry of an order of sentencing consistent with this decision and the issuance of a new abstract of judgment accordingly.

BAKER, J., and MAY, J., concur.